

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

OCT -9 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MICHAEL A. WELCH,

Appellant.

)
)
) 2 CA-CR 2007-0308
) DEPARTMENT A
)

) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20062363

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED AS MODIFIED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, Michael Welch was convicted of twenty-one felony charges, including burglary, aggravated assault, kidnapping, armed robbery, and aggravated robbery. Four of Welch’s convictions were also determined to be “dangerous crimes against children.” On appeal, Welch contends the trial court erred in denying his motion for judgment of acquittal on the dangerous crimes against children allegations, in denying his motion for a judgment of acquittal on an armed robbery count, and in stating during sentencing that Welch was required to receive a minimum sentence of seventeen years for each offense that was a dangerous crime against children. Because the trial court did not abuse its discretion or err, we affirm the convictions. We also resolve two discrepancies between the sentencing minute entry and transcript. We modify the minute entry and affirm Welch’s sentences.

Background

¶2 We view the facts and reasonable inferences therefrom in the light most favorable to affirming the convictions. *See State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). In November 2005, Welch and an accomplice rang the doorbell of the victims’ home. When one of the victims opened the door, Welch and his accomplice pointed a gun at her and forced their way into the home. As Welch’s accomplice held the victims at gunpoint, Welch ransacked the home, stealing cellular telephones, a computer, and jewelry. Two of the victims were under the age of fifteen at the time of the home invasion.¹

¹Five victims were present during the home invasion. One victim, M., was six years old. Another victim, A. Junior, was fourteen years old.

Rule 20 Motion—Dangerous Crimes Against Children

¶3 Welch first argues the trial court erred in denying his motion for judgment of acquittal on the dangerous crimes against children allegations, submitted pursuant to Rule 20, Ariz. R. Crim. P. We review the denial of a Rule 20 motion for an abuse of discretion “and will reverse only if no substantial evidence supports the conviction.” *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

¶4 Section 13-604.01, A.R.S., prescribes enhanced penalties for defendants convicted of dangerous crimes against children. Under this statute, a person commits a dangerous crime against children when he commits, inter alia, an aggravated assault or a kidnapping against a victim under fifteen years of age. § 13-604.01(N)(b)(i). The offense must be “focused on, directed against, aimed at, or target[ed]” at the child victim. *State v. Williams*, 175 Ariz. 98, 103, 854 P.2d 131, 136 (1993). An offense is not a dangerous crime against children, however, when the child victim was only “fortuitously” injured by reckless, generalized “unfocused conduct.” *Id.*

¶5 In *Williams*, the court stated that the sentencing provisions of § 13-604.01 were intended to apply to “criminals who prey specifically upon children” and “predators who pose a direct and continuing threat to the children of Arizona.” 175 Ariz. at 102, 854 P.2d at 135. Because Williams had caused a car accident that injured a fourteen-year-old passenger and had “not prey[ed] upon helpless children but [had] fortuitously injure[d a child] by [his] unfocused conduct,” the supreme court determined the trial court erred in sentencing him under § 13-604.01. *Id.* at 103, 104, 854 P.2d at 136, 137.

¶6 In *State v. Sepahi*, 206 Ariz. 321, ¶ 16, 78 P.3d 732, 735 (2003), our supreme court clarified its holding in *Williams*, stating:

While, as *Williams* holds, the phrase “committed against a minor under fifteen years of age” can naturally and logically be read as requiring targeting of a child, it stretches that statutory language beyond ordinary bounds to read it as also necessitating proof of some sort of special continuing dangerous status on the part of the defendant. While the legislature could have rationally passed such a statute, it did not do so, and we cannot rewrite the statute to reach such a result.

See also *State v. Miranda-Cabrera*, 209 Ariz. 220, ¶¶ 16-19, 99 P.3d 35, 39 (App. 2004) (observing that our supreme court “reject[ed] the rationale” in *State v. Samano*, 198 Ariz. 506, 11 P.3d 1045 (App. 2000), which had concluded a defendant must specifically prey upon a child to be convicted of a dangerous crime against children). The supreme court further stated that “in order to prove that a defendant has committed a dangerous crime against a child, the State must prove that the defendant committed one of the statutorily enumerated crimes and that his conduct was ‘focused on, directed against, aimed at, or target[ed] a victim under the age of fifteen.’” *Sepahi*, 206 Ariz. 321, ¶ 19, 78 P.3d at 735, quoting *Williams*, 175 Ariz. at 103, 854 P.2d at 136 (alteration in *Sepahi*).

¶7 Welch was convicted of four dangerous crimes against children—two counts of aggravated assault against a minor under fifteen and two counts of kidnapping a minor under fifteen. Substantial evidence supported the jury’s finding that both Welch’s aggravated assault offenses and his kidnapping offenses involved conduct directed or targeted at the minors in question. Welch and his accomplice forced their way into the victims’ home at gunpoint. All of the victims, including two children under the age of fifteen, were then

forced into the living room and held at gunpoint while Welch ransacked the home. M., the six-year-old victim, was brought into the living room with his mother at gunpoint. A. Junior, the fourteen-year-old victim, was individually brought into the living room at gunpoint. This conduct was not “unfocused” but necessarily directed at the two children along with the other members of their family.

¶8 Citing *Williams*, Welch argues that the children “just happened to be in the house at the time of the robbery,” that his actions “only fortuitously affected” them, and that he therefore did not “specifically prey” upon children. But Welch specifically committed aggravated assault and kidnapping against each of the two children individually. Even if, as Welch argues, he did not know that children lived in the home and therefore did not plan to assault and kidnap the children “in their capacity as children,” he nonetheless intentionally and knowingly did assault and kidnap them during the invasion.

¶9 Additionally, by forcibly entering a family home at gunpoint, and using a gun to force all of the family into the living room, Welch necessarily “targeted” the entire family, including the two family members who were under the age of fifteen. *Sepahi*, 206 Ariz. 321, ¶ 19, 78 P.3d at 735. And, A.R.S. § 13-604.01 “can apply to a defendant whose intention it is to “direct his criminal conduct only at adults . . . when his victim turns out to be a child.” *Miranda-Cabrera*, 209 Ariz. 220, ¶ 18, 99 P.3d at 39, *quoting Sepahi*, 206 Ariz. 321, ¶ 17, 78 P.3d at 735 (omission in *Miranda-Cabrera*). Therefore, the trial court did not abuse its discretion in denying Welch’s motion for a judgment of acquittal on the state’s allegation that certain of the offenses were dangerous crimes against children.

Rule 20 Motion—Robbery Charge

¶10 Welch also claims that the trial court erred when it denied his motion for judgment of acquittal on a robbery count, pursuant to Rule 20, Ariz. R. Crim. P. Welch argues that because the victim of the robbery count was six years old and the record contains no evidence that any of his personal property was taken or that any property was taken from his person or immediate possession, no robbery of the six-year-old victim could have taken place. We review a denial of a Rule 20 motion for an abuse of discretion and will only reverse if no substantial evidence supports the conviction. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

¶11 A defendant is guilty of robbery if, “in the course of taking any property of another from his person or immediate presence and against his will, [the defendant] threatens or uses force against *any person*” intending to “coerce surrender of property or to prevent resistance to . . . taking or retaining the property.” A.R.S. § 13-1902 (emphasis added). The victim of a robbery, however, need not own the property being taken. *See State v. Riley*, 196 Ariz. 40, ¶ 19, 992 P.2d 1135, 1141 (App. 1999) (bank employees were victims of robbery when defendants took cash from bank’s vault); *see also State v. McGuire*, 131 Ariz. 93, 96, 638 P.2d 1339, 1342 (1981) (defendant guilty of robbery when he used force against named robbery victim to stop her from resisting taking of husband’s property). And, a defendant is guilty of robbery even if he does not take property from the particular victim’s immediate presence, so long as he took property from the immediate presence of someone against whom he was also using force. *See Riley*, 196 Ariz. 40, ¶ 19, 992 P.2d at 1141.

¶12 Because substantial evidence supports the jury’s finding that Welch used force against the six-year-old victim to prevent resistance to his taking property of another victim, and because Welch took property from the immediate presence of at least one of the other victims, the trial court did not abuse its discretion in denying Welch’s motion for a judgment of acquittal on one of his robbery charges.

Sentence for a Dangerous Crime Against Children

¶13 Finally, Welch argues the trial court erred when it stated that the Dangerous Crimes Against Children statute, A.R.S. § 13-604.01, mandated that he receive a presumptive prison term of seventeen years for each dangerous crime against children conviction. Because Welch failed to raise this issue below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶14 The presumptive prison term for a defendant convicted of a dangerous crime against children involving aggravated assault or kidnapping is seventeen years. § 13-604.01(D). But if aggravating or mitigating factors are present, this prison term may be increased or decreased by up to seven years. § 13-604.01(G); A.R.S. § 13-702. A defendant convicted of committing a dangerous crime against children while on probation for a conviction of a felony offense, however, cannot be sentenced to less than the presumptive prison term. § 13-604.02(A), (B); *see also State v. Lujan*, 184 Ariz. 556, 560, 911 P.2d 562, 566 (App. 1995) (trial court has “no discretion” to sentence defendant on probation at time of dangerous crime against children offense to a “term less severe than a presumptive term of seventeen years flat”).

¶15 Welch was on probation for a felony offense when he committed the offenses and therefore could be sentenced to no less than the presumptive prison term. Because the trial court could not have sentenced Welch to less than the presumptive, seventeen-year term, it did not commit error, much less fundamental error.

Discrepancies Between Sentencing Transcript and Minute Entry

¶16 In its answering brief, the state has alerted this court to two discrepancies between the trial court's oral pronouncement of sentence and its sentencing minute entry. When there is a discrepancy or conflict "between the minutes and a reporter's transcript, the circumstances of the particular case determine which shall govern." *State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969). We have a "duty to interpret all parts of the record together, giving effect, if possible, to all and a deficiency in one place may be supplied by what appears in another." *Id.* When something is omitted from the oral pronouncement of sentence but is present in the sentencing minute entry, we may give "greater weight to the minute entry than to a conflicting, silent transcript." *State v. Gelden*, 126 Ariz. 232, 232, 613 P.2d 1288, 1288 (App. 1980); *see also Rockerfeller*, 9 Ariz. App. at 267, 613 P.2d at 625. But when an express conflict exists between the oral pronouncement of sentencing and a minute entry, the oral pronouncement generally controls. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968 n.3 (App. 1999).

¶17 The state first points out that the sentencing minute entry erroneously states that the sentences for counts three, seven, and eleven shall be served concurrently, but the trial court orally pronounced them to run consecutively to one another. Because this constitutes

an express conflict, the minute entry is modified to be consistent with the oral pronouncement of Welch's sentence. *See id.*

¶18 Additionally, the state also notes that the sentencing minute entry states the trial court imposed a presumptive, 10.5-year term for count four but the transcript of sentencing is silent as to the length of the sentence for that count. Because the minute entry, signed by the trial judge, states that Welch is sentenced to 10.5 years' imprisonment for count four and this sentence is to be served concurrently with other sentences, the longest of which is 10.5 years, we accept the minute entry recital as reflecting the correct sentence for count four. *See Rockerfeller*, 9 Ariz. App. at 267, 451 P.2d at 625.

Conclusion

¶19 In light of the foregoing, we affirm Welch's convictions. We also modify the sentencing minute entry consistent with this decision and affirm Welch's sentences accordingly.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge